

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
LARRY AND DOLORES NICOLAI, )  
 )  
Appellants, )  
 )  
v. )  
 )  
WAYNE S. BERG, d.b.a. )  
B & I WELL DRILLING COMPANY )  
and STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
 )  
Respondents. )

PCHB No. 78-99

ORDER

This matter arises under the Water Well Construction Act, chapter 18.104 RCW. A hearing was held before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, Chris Smith and David A. Akana, Members, on August 16, 1978 in Tacoma, Washington. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230. Seattle reporter Kim Otis Rommel recorded the proceedings.

Appellants appeared by their counsel, William L. Denend.

WJH:DO

Respondent Department of Ecology appeared by its counsel, Laura E. Eckert, Assistant Attorney General. Respondent Wayne S. Berg, d.b.a. B & I Well Drilling Company, failed to appear.

Having heard testimony and legal argument and being fully advised, the Hearings Board enters the following

#### CONCLUSIONS OF LAW

##### I

The Pollution Control Hearings Board is without jurisdiction to either hear or decide the merits of this matter. For this reason, our hearing was improvidently granted. Notwithstanding this, the record made before the Hearings Board in this matter should be transmitted to the Department of Ecology for such action as it deems appropriate.

##### II

RCW 18.104.120 states:

Complaints against contractors or operators. Any person with an economic or noneconomic interest may make a complaint against any water well contractor or operator for violating the provisions of this chapter or any regulations pursuant hereto to the pollution control hearings board established pursuant to chapter 43.21B RCW. The complaint shall be in writing, signed by the complainant, specify the grievances against said licensee and be accompanied by a ten dollar filing fee.

This provision is anomalous for two reasons. First, it accords to the Hearings Board the responsibility for receiving complaints while the authority for providing relief, in the form of a license suspension or revocation, is accorded to the Department of Ecology by RCW 18.104.110. Second, although the function which identifies the Hearings Board is to hold hearings, RCW 18.104.120 accords no right of hearing. Thus, if the Hearings Board convenes a hearing under RCW 18.104.120, it does so with

ORDER

1 statutory authority and without power to grant relief.<sup>1</sup>

2 III

3 Appellants are unable to invoke our review under RCW 18.104.130  
4 relating to review of a Department of Ecology Order. This is so because  
5 the only candidate for characterization as a reviewable Order is the  
6 letter of John Swerda dated February 17, 1978. Appellants' appeal,  
7 received April 25, 1978, is not made timely within the strict 30-day  
8 requirement set forth within RCW 18.104.130 even if it were to be found  
9 an appealable order.

10 IV

11 Appellants have, in good faith, stated their complaint to both the  
12 Department of Ecology and this Hearings Board. They have exhausted every  
13 legal requirement for making their complaint.

14 ORDER

15 The record in this matter shall be transmitted to the Department  
16 of Ecology for such action as it deems appropriate.

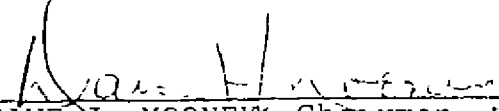
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21 1. Even assuming, arguendo, that this is not the case, severe  
22 practical difficulties would beset any hearing convened before the  
23 Hearings Board under RCW 18.104.120. Lacking power to grant relief, the  
24 Hearings Board would have to hear evidence, then transmit its Findings of  
25 Fact and Conclusions of Law to the Department of Ecology for license  
suspension/revocation action. The Department of Ecology official who is  
to decide suspension/revocation, having not heard or read the evidence,  
would then need to personally consider the whole record including a  
transcript. RCW 34.04.110. Next, if suspension or revocation were  
ordered by the Department of Ecology, the sanctioned licensee could  
invoke a further hearing before the Hearings Board, under RCW 18.104.130  
relating to our review of Department of Ecology orders.

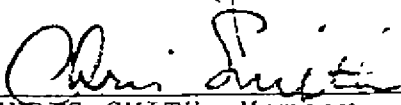
27 ORDER

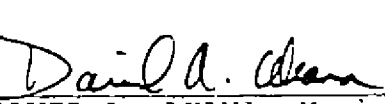
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DATED this 12<sup>th</sup> day of September, 1978.

POLLUTION CONTROL HEARINGS BOARD

  
DAVE S. MCGONEY, Chairman

  
CHRIS SMITH, Member

  
DAVID A. AKANA, Member

ORDER